



Issue Date: 09 July 2004

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In the Matter of

STATE OF FLORIDA,
DEPARTMENT OF LABOR AND
EMPLOYMENT SECURITY
Complainant

Case No. 1999-JTP-16

v.

U.S. DEPARTMENT OF LABOR
Respondent
.....

Before: Stuart A. Levin
Administrative Law Judge

For State of Florida:
Carolyn D. Cummings, Esq.
Tallahassee, Florida

For U.S. Department of Labor:
Stephen R. Jones, Esq.
Office of Solicitor, U.S. Dept. of Labor

Decision and Order

This matter arises on appeal by the State of Florida, Department of Labor and Employment Security (FDLES) from a decision by the U.S. Department of Labor that it misspent over \$11,000,000 in federal funds granted to it under the under Title III of the Job Training and Partnership Act (JTPA), 29 U.S.C. § 1501 *et. seq.* Between March 1, 1995 and June 9, 1998, the Employment and Training Administration, U.S. Department of Labor, (DOL) granted the State of Florida \$11,419,499 under Title III of the JTPA, to fund a Performance Based Incentive

Program (PBIF) established by the Florida legislature and administered by the FDLES to provide job retraining opportunities to unemployed workers who, due to economic conditions, were permanently laid-off or terminated. During the period in question, Florida used JTPA money to pay community colleges and school districts that participated in the program. On June 28, 1999, a DOL Grant Officer, acting upon an audit report issued by DOL's Inspector General (OIG) and the State's response to his initial Determination, concluded that the entire amount funneled by FDLES through the PBIF was misapplied and subject to debt collection. FDLES objected and requested a hearing. The findings which follow are based upon the evidence developed at that hearing and the briefs filed by the parties post-hearing.

Findings of Fact

1. During periods of time pertinent to this proceeding, the Job Training Partnership Act (JTPA) (29 U.S.C. § 1501 Ct seq.) authorized DOL to provide employment and training opportunities for eligible individuals. JTPA was superseded by the Workforce Investment Act (WJA) (29 U.S.C. § 2911 et seq.) on June 30, 2000.

2. JTPA Title II required DOL to fund JTPA programs for disadvantaged youths, while Title III mandated services for dislocated workers. These programs were implemented at the State level under the watchful eye of an ETA Grant Officer (GO) who oversaw the disbursement of federal funds to ensure they were spent in accordance with the JTPA and the implementing regulations promulgated And published at 29 C.F.R. Part 627 and Part 631).

Re-training Dislocated Workers Florida's New Approach

3. Robert O'Leary, an aid to former Florida governor Lawton Chiles testified that the PBIF originated as an initiative to review governmental programs and operations designed to enhance workforce development strategies nationwide. Tr. 292. In furtherance of this initiative, DOL Assistant Secretary Doug Ross met with then-Florida Governor Lawton Chiles and other officials to craft a demonstration project using a "blend of money" for new workforce development strategies. Tr. 292-295. Thereafter, meetings between DOL and Florida officials were held both in Washington and Florida to discuss and finalize aspects of the demonstration project. Tr. 292-295. Florida drafted the PBIF Program in cooperation with Assistant Secretary Ross and his staff, Tr. 292-295; however, the record does not

indicate that DOL ever specifically approved Florida's program. The final version of the demonstration project enlisted Florida educational and vocational institutions to train dislocated workers in high skills and high wage jobs using both state and federal funds. Tr. 331. Florida viewed this demonstration as a partnership with DOL. Tr. 293; 295.

4. Before the inception of PBIF, community colleges and school districts in Florida lacked focus on JTPA participants. Tr. 478. The schools served the students who sought their programs, usually recent eighteen year old high school graduates. Although the curricula were outdated, Florida vocational schools and community colleges still filled their seats prior to PBIF. Tr. 335. The education system did not pursue and did not expect that dislocated unskilled workers in large numbers would seek job training assistance on their own initiative. Tr. 368, 372.

5. Florida's performance was consistent with Congressional findings that schools were "creaming" the best students; i.e. training those with fewest training needs and the best job prospects. (Job Training Reform Amendments of 1992, P.L. 102-367, at 919). Because the JTPA program was not focusing on the hard to serve individuals, Congress found that a disproportionate number (60%) of all participants in the eligible population nationwide, were high school participants. (Id. at 919-920). Thus, Congress recognized that merely providing equal access to JTPA programs was not sufficient, in itself, to encourage and inspire the eligible populations of individuals to seek re-training.

6. During the formulation of the PBIF concept, the tendency to service those most likely to succeed was identified as a problem in Florida's educational system and was verified by a state Self-Sufficiency Commission Study which focused on dislocated workers and welfare recipients. Tr. 366; 374-75. A comparison of the likelihood of employment by higher skilled dislocated workers with that of lower skilled dislocated workers was also undertaken. Tr. 366. It was determined that on the average it cost more to locate, educate, and train dislocated workers, who, in most instances, had been out of the educational system on average about twenty years, than it was for the schools to find and serve an eighteen year old high school graduate. Tr. 368, 372. Studies showed that recent graduates could be served at less costs than a thirty-eight year old dislocated worker with low skill levels. Id.; Tr. 368, 372. Further, the study found that substantial numbers of dislocated workers were falling into the welfare population, that they were not being trained in the private or the public sector, that the lower end dislocated workers, even with the advantage of work records, generally had low skill levels, and after twenty-six weeks of receiving unemployment compensation, they generally became part of

the welfare population not part of the student population at school districts or community colleges. Tr. 366, 369. The studies indicated that a substantial number of dislocated workers who ended up on welfare, generally had exhausted their ability to find employment in a poor job market. Tr. 366.

7. Although JTPA eligible participants had the same opportunity to enroll in training courses as non-JTPA participants, they tended not to enroll in education and training courses on their own initiative and were not being served. Tr. 358, 366; Tr. 404. The PBIF program recruited eligible participants into the re-training program. Tr. 555, 562, 567, 572.

PBIF Implementation

8. Section 302 (c) of the JTPA provided the Governor with the authority to adopt statewide, regional or industry wide projects, and, at the Governor's discretion, to fund those programs from his 40% reserve of Title III funds. Congress granted the Governor flexibility in designing and administering state and local programs. (JTPA Legislative History, P.L. 97-300, S. Rep. No. 97-469, page 2660, (1982); see also, F.R. Vol. 59, No. 170, pgs. 45809- 45813, September 2, 1994). Thus, in its Final Rule Comments related to cost limitations, DOL expressed its intent to encourage states to design their own programs in a manner to best serve the eligible population and allow states flexibility in designing programs and services under Part III-B of the JTPA, including demonstration projects. F.R. Vol. 59 at 45813.

9. In 1994, Florida submitted its PBIF legislation to ETA for review and comment. AF at A-9. In December 1994, Assistant Secretary Ross responded, in part, as follows:

[T]he procurement of any services utilizing federal funds, including classroom training under the [JEP] Fund, must comply with the requirements of 20 CFR 627.420 of the JTPA regulations as well as section 164 of the Act. These requirements ensure, among other things, that services purchased with scarce public resources are reasonable and cost effective. Id.

10. Governor Chiles issued Executive Order 95-468, one of a series of Executive Orders, that outlined the strategy to redesign Florida's workforce development system and created the workforce project referred to as PBIF. Tr.

297; CX. 17. The Executive Order set forth several elements of the workforce development strategy, the last of which incorporated the strategy of performance based training by educational institutions which focused on training dislocated workers for high skills high wage jobs. CX-7, at 3-4. The Executive Order specifically directed that the Jobs and Education Partnership (JEP) determine and design an effective use of Title III Economic Dislocation and Worker Adjustment Act (EDWAA) funds, working through an interagency Office on High-Skill/High-Wage Jobs, (CX. 17, at 8, Sec. 8), formulate a basis for requesting statutory authorization and legislative funding from the Florida legislature to implement the workforce initiative, and request annual legislative appropriations. Tr. 297; Tr. 326.

11. The Florida legislature authorized the program during the 1994 legislative session. S.101 8; Chapter 239.249, Fla. Stat. CX-20-A, Tr. 298-300). The performance-based fund combined the resources of federal and state funds, including the Governor's discretionary funds under Title III of the JTPA. Tr. 299, CX-20-A at 17. In 1994, the Florida Legislature, pursuant to the General Appropriations Act, allocated up to \$17 million from the Governor's Discretionary funds in the EDWAA. The legislature specifically directed:

“[f]unds will be earned by school districts and community colleges under a performance based funding approach, structured as incentives to vocational programs for producing trained workers in occupations identified in the Occupational Forecasting Conference (Chapter 216.136, Florida Statutes, and for enrolling, training, and placing dislocated workers as defined in Section 301(a) and 314(f), (g) and (h) of the JTPA Federal Regulations. Up to \$17 million of the Governor's Discretionary Economic Dislocation and Worker's Adjustment Assistance Act (JTPA Title III) Allocation, available for training dislocated workers, may be used in this performance based funding project.” CX-20-A, pg 21; Tr. 305-306; CX-20-A, at 10, para. B; Tr. 546.

12. The legislative purpose as outlined in the preamble to the legislation was to create a market-driven, performance-based incentive funding program for post-secondary vocational education programs in public school districts and community colleges to, *inter alia*, prepare adults to enter occupations needed by business and industry and to encourage economic development and the improvement of self-

sufficiency for adults who otherwise would require public assistance. Tr. 299-301; CX-20-A, at 8.

13. The State planned to integrate its education, training, and employment programs to encourage the participation, education, and training of individuals, including dislocated workers that federal and state law identified as needing guidance, training, and additional services. CX-20-A, at 4-5.

14. Under the PBIF program, Florida educational institutions were, for the first time, reimbursed for their instructional costs based on performance and not just based on full time equivalency (FTE) numbers. Tr. 466, 522, 528. Prior to PBIF, the school districts and community colleges served the students who walked through their doors. PBIF was designed to encourage more aggressive recruitment techniques directed at the target population. Tr. 478.

15. The Florida legislature provided an annual appropriation set aside in the General Appropriations Act which was administered by the Florida Education Finance Program and the Community College Program. The fiscal year 1994-95 appropriation was over \$28 million, including \$17 million from JTPA and the rest from Project Independence, the Department of the Lottery, and Department of Commerce. CX-20-A pg. 21. Fiscal year 1995-96 appropriation was \$28 million, including \$18 million from JTPA, \$6 million from Project Independence, and \$4 million from the Lottery. State money was deposited into two trust funds: a Community College fund and a school district or vocational technical center fund. Tr. 316, 318, CX. 20-A, at 12. A third trust, a PBIF trust fund, contained both federal and state funds. DOL Exhibit 2, Volume 4 at 158; Tr. 230-232.

16. The PBIF program was designed to reward Florida schools that achieved certain levels of participation and results with JTPA-eligible individuals through payments out of the State's JTPA Title II and Title III funds. AF at B-21; Tr. 305 and 318. Most of the questioned funds were disbursed under Title III; however, the PBIF program also disbursed \$1,768,789 under the JTPA Title II (disadvantaged youth) program. AF at B-48. The Jobs and Education Partnership (JEP) administered the program. AF at B-24.

17. During the period in question, approximately 60 percent of the JTPA "formula" funds allocated to Florida flowed through the Regional Workforce Development Boards (RWDBs) or the Private Industry Councils (PIC). Tr. 489. The remaining 40 percent (the "Governor's Reserve") was administered at the

State level. The JTPA funds that JEP disbursed through the PBIF program were from the Governor's Reserve.

School Funding

18. The record shows that during the period covered by this audit, the methods used by the State to provide for revenue funding to school districts and community colleges differed. Funding for both was not based strictly on the number of FTE students. Tr. 518.

1.

Community Colleges

19. Ed Sisek, Vice chancellor for Finance and Information, Division of Community Colleges, Florida Department of Education, testified that the Florida legislature employed different methodologies annually to determine the level of appropriation to community colleges for instructional costs beyond tuition payments. Tr. 520, 530. Other factors effecting funding levels included equipment replacement, technology needs, and the ability of the community colleges to lobby the legislature for resources. Tr. 536. During PBIF, various factors determined the level of funding, but once the annual allocations were determined, no other additional appropriations were made. Tr. 526, 540. As a result, the State did not cover the costs if a school incurred expenses which exceeded its tuitions and appropriations.

2.

School Districts

20. Linda Hartnig, Policy Coordinator, Division of Workforce Development, Florida Department of Education, explained that funding for vocational education in the school districts, in contrast, during PBIF was based on projected FTEs, or a fixed amount per student times the number of weighted students after an adjustment for program costs. Tr. 457, 470; Tr. 534-536. For legislative funding purposes, the school districts projected the number of students they could serve the next fiscal year. Tr. 470. These projections included grades K-12 and adult vocational education and were submitted to the Florida House of Representatives, the Senate, the Governor's Office, and the Department of Education, which, in turn, recommended the number of FTEs to the legislature which determined the number of FTEs and the level at which the FTEs would be funded. During PBIF, once the legislature set the annual appropriations for the school districts, no

additional allocations were made regardless of whether the districts served more students or fewer students than projected. Tr. 470-471. Thus, while the legislature capped the number of funded FTEs each school district received annually, students could be accepted and served above the cap. Tr. 471. The record shows that expenses for vocational instructional costs beyond tuition at the school districts were not guaranteed by the State.

3.

Calculating PBIF Payments

21. Hartnig explained that the costs and price analysis formulated to determine PBIF payments utilized the FTE philosophy which attributed 900 clock hours to one FTE, Tr. 460, and was specifically designed to arrive at a cost that would always be less than the actual costs of instruction for certificate programs at school districts and for degree programs at community colleges.

22. The record shows that the state cost data reporting system collects expenditures from the school districts and generates data bases and expenditure reports. Each school district is required to submit annual financial reports to the state. CX-19 at 1-3, Tr. 458, 474. Hartnig and her committee first analyzed school district expenditure data from 1992/1993. Tr. 457; CX-4, at 4. Direct costs, i.e. salaries, benefits, materials/supplies, capital outlay, etc., were taken directly off of the costs reports and to that amount, selected indirect costs were added to arrive at the total costs for all adult jobs programs. Tr. 459, CX 19, at 2, CX-4, at 4. Other reported indirect costs, i.e. for School Boards and Superintendents were not included, to assure that the expenditures that were counted were legitimate expenditures under the JTPA. Tr. 480. Indirect costs that were counted included pupil personnel, instructional media, instruction and curriculum, and school administration. CX-4, at 4. The arrived at costs or incentive was then taken times the 900 hours and the result was then divided by ninety percent to allow for tuition at ten percent of the costs. Tr. 460, CX.4 at 4,7.

23. By considering the length of the programs, Florida calculated the break even point when the reimbursable amount equaled the instructional costs. Tr. 461. The break even point assured that the reimbursable amounts were always less than the actual costs of instruction. (Id.). As a result, the full incentive amount of \$1,810.64 would only be paid for certificate programs of 488 hours or more and the full incentive amount of \$2,924.88, would only be paid for degree programs of 789 hours or more. Tr. 461; CX-4, at 4, 7. Schools were paid lesser amounts of up to \$974.96 for those students who enrolled but dropped out after 263.10 hours of

instruction for whatever reasons. (Id.). During the program, institutions were paid the full amount only a small percentage of the time, Tr. 465. The PBIF program thus adopted the lower school district training costs to reimburse both community colleges and school districts and placed performance restrictions on the schools' ability to earn the full incentive amounts if the eligible students failed to stay in the training programs for a minimum period.

4.

State Funding

24. During the PBIF program, the Florida legislature increased the number of FTEs it funded for Group Adult Vocational Education and increased the base student allotment per FTE; however, increases did not cover the full cost of instructional training. Tr. 477. Moreover, once the Florida legislature appropriated general revenue funds to school districts and community colleges, it did not appropriate any extra money in the interim between legislative sessions. Tr. 319-320; 471; Tr. 478.

25. FTEs in Florida, for K-12 were generally based on a fixed amount per student, multiplied by the number of weighted students (number after adjustments for program costs). Tr. 534. During the 1994/95 school year, the approved and funded FTEs statewide for post secondary certificate programs in the school districts totaled 120,557.49. During the same year, 5,619.96 FTEs over cap were served. Tr. 474, CX-19, at 5. Because the legislature paid \$2,558 per FTE that year, the students served over cap translated into over 14 million dollars. Id.

26. During the 1995/96 school year, the legislature approved and funded cap for school districts was 145,409.45. During that school year, 6,366.22 FTEs over cap were served, which translated into over 17 million dollars that school districts were not paid by the state for services provided to students. Tr. 475, CX-19, at 6. During that school year, the base student allocation was \$2,800. Id. The 1996/97 school year had similar statistics. The school districts served 4,600 FTE over cap. Tr. 477.

27. The auditors concluded that unless FDLES could show that JTPA eligibles were not included in the FTEs then they were in fact funded by the State. Tr. 279. The record shows that PBIF students were included in the FTEs used to fund the schools, and the evidence does not specifically link any particular unfunded FTE to a PBIF student. Tr. 484. PBIF funds, however, did allow schools to serve more students. Tr. 486-87. The PBIF program assured, however, that

before federal funds could be used (1) state revenue was first exhausted and (2) the state's level of funding and assistance to adults in the post-secondary area would not be reduced because of federal funds. Thus, PBIF legislation mandated that: (1) before the community colleges and school districts could become eligible for PBIF funding, their annual legislative appropriations were required to be earned and expended based on the education and training of the general population and the target population of students as well; and (2) their reimbursements were required to be used to benefit vocational education programs, including for equipment upgrades, program expansions or any other usage that would result in program improvement. Tr. 313; Tr. 564-565; CX-20-A, at 11. Tr. 306.

Florida's Obligations

1.

Tuition

28. In Florida, tuitions are established by Florida Statute (F.S.) Section 239.117 which capped the percentage of instructional costs funded by student tuition at 25% for Associate Degree programs and 10% for Certificate programs. AF at B-28; B-23.

29. Section 239.117, Florida Statutes, (1995) provided in pertinent part,

Each year the State Board of Community Colleges shall review and evaluate the percentage of the cost of adult programs and certificate career education programs supported through student fees.... For students who are residents for tuition purposes, the schedule so adopted must produce revenues equal to 25 percent of the prior year's program cost for college-preparatory and supplemental vocational programs and 10 percent of the prior year's program costs for certificate career education and vocational preparatory programs. (CX-21, pg. 2).

2.

Other Funding

30. The record shows that the audit report and the Grant Officer's Determination were predicated on the understanding that Section 239.117 obligated the State to pay 90% of the instructional costs of Certificate programs and 75% of the instructional costs for Associate Degree programs. Tr. 100-01;

126-28; 233, 238, 276-78. CX-2 I. The record shows further, however, that this statute establishes the portion of instructional costs paid by the student as tuition but does not obligate the State to pay the remaining costs. Tr. 468-69; Tr. 521; (*Contra*; RX 1at 28). The remaining 75% or 90% of instructional costs, depending on the degree program, were paid through funds appropriated by the legislature, lottery receipts, other state sources, or absorbed by the school through cost cutting initiatives. AF at B-21. The remaining costs associated with education and training at the community colleges and school districts were allocated annually by the legislature, and the amounts received did not adhere to the percentages in Section 239.117. Tr. 516; 524.

31. Section 239.117 provides the policy, process, and guidance for the legislature to determine and establish student fees only and neither establishes instructional costs nor the State's funding level. Tr. 468-69; Tr. 513. It guides the college credit program, but its percentage recommendations are not always followed. Tr. 516. Over the years, the legislature has not always funded the percentages above tuition as set forth in Section 239.117. Tr. 516-517; 530, 550, 552, 560.

32. During the period of the PBIF, the corresponding 75% and 90% educational costs above the tuitions set forth in Section 239.117 were never fully appropriated by the legislature for each student served. Tr. 526; 524. Annually, the schools were appropriated a finite amount of state revenue funds, but during the three years of the PBIF program the appropriations never amounted to the remaining 75% and 90% of educational costs related to all students served. Tr. 471-477, 560.

33. Steve Campora, formerly the Director of the Performance Based Section of the Economic Division of the Florida Department of Commerce, explained further that the PBIF program mandated that each educational entity participating in the program sign a contract which set forth its agreement to be a part of the PBIF program. Tr. 421, CX.13. Participating educational entities agreed to place a certain percentage of their annual legislative appropriation at risk, and if they did not perform up to the level of the base year, they not only would be ineligible for incentive payments, but they would also lose the percentage of their own appropriated money that had been voluntarily placed at risk. Tr. 406; Tr. 420. Financial and educational performance records for the 1993/1994 program years (the year prior to the implementation of PBIF) of participating entities, were used to determine the base that each entity had to reach.

34. The schools placed a percentage of their annual appropriation at risk, which meant they could lose at risk funds if performance did not reach the level of appropriated funds. Tr. 308, 347, Tr. 547. Thus, the schools were required to document sufficient performances to satisfy the expenditure of their appropriated funds before the JEP would notify the Department of Education officials to release their at risk state funds and deem them eligible for earnings under PBIF. Tr. 311; Tr. 472. A few schools did lose their at risk funds in the beginning of the program. Tr. 547.

35. The program was designed to preclude the educational entities from tapping federal funds until their base level performance was achieved. Tr. 406-07. Thus, each school had to reach a level of performance (base level) in the current year that it had reached the prior year before any PBIF reimbursements could be earned for serving the eligible population, over and above the number of students that had been served prior to PBIF. Tr. 406; Tr. 567-568.

36. Dr. Lanny Larson, Vice Chancellor for Technology and Career Success Division of Community Colleges, Florida Department of Education, testified that once educational entities expended all of their appropriated funds, but continued to enroll students as required by law, budgetary problems occurred and many are forced to make other reductions and adjustments in programs and in courses. Tr. 583. Such reductions during the PBIF would have adversely affected the eligible participants. Hartnig testified that the cap placed on legislative appropriations impacted schools whether or not the educational entities added additional sections and courses. Tr. 493.

37. The PBIF funding mechanism established by the legislature was designed to reimburse the schools for the use of funds they had advanced to serve dislocated workers. Tr. 308; Tr. 419; Tr. 492-494; Tr. 564, 579.

Participants

38. The RWDB's recruited JTPA eligibles, referred them to programs at community colleges and vocational schools, and paid their tuition. AF at B-30 through B-31; Tr. 139-140, Tr. 218-219 and Tr. 444; DOL Ex. 2, Volume 4 at 162, Volume 18 at 328 and Volume 36 at 529. The targeted populations included those eligible for public assistance, economically disadvantaged, the disabled, those not proficient in English, and dislocated workers. Tr. 305-306; CX-20-A, at 10, para. b. The PICs and other local entities, including various unemployment service

offices provided recruitment and enrollment services which identified eligible participants for the PBIF program. Tr. 11, 490, 562-563.

39. To achieve admission, JTPA participants had to satisfy the same entrance requirements and had the same opportunity as non-participants to enroll in PBIF courses. Tr. 70-73; Tr. 344; Tr. 444, 484; Tr. 523, 542. Once admitted, they received the same instructional materials, content, and duration. CX A1 at B-32; Tr. 74, Tr. 482; Tr. 558. The availability of JTPA assistance had no bearing on a JTPA participant's access to services offered by the schools. Tr. 488-489, 491; Tr. 542. FDLES acknowledged that:

We did not try to distinguish in our services to Title 3 folks or the welfare folks or the disabled folks. We did not try to set them aside and - - we were worried about stigmatizing one group over another. And so we did not do that. The services were given at the community college and the school district, as they are with - - with any students. What was needed in terms of counseling, what was needed in terms of placement services is always done on an individual student basis, to help them maximize their success. Tr. 556. *See also* CX A1 at B-58.

40. Clarence E. Smith, Supervisory Auditor, DOL Office of Inspector General, Atlanta Region, testified that for the most part, JTPA students and their status as JTPA participants were "invisible" to the schools and their instructors during the students' attendance. AF at B58; Tr. 593-594; Tr. 603-604. The OIG concluded that JTPA students were "transparent" to the schools, AF at 17, and in many cases the students themselves may not have known about the PBIF payments made on their behalf. Tr. 142. Smith testified that the schools submitted their entire enrollment roster to MIS to identify JTPA eligibles. Tr. 142. Allegedly, "The only thing that occurred in order to generate the payment was the identification of JTPA eligibles, not service to those eligibles." Tr. 239.

41. The record shows that while the various educational institutions did not maintain separate placement offices for eligible participants and did not specifically document "that those [additional] services were provided," Tr. 481. *See also* Tr. 578-79, the PBIF program, as a whole, did target dislocated workers for enrollment in training programs designed to enhance their employability. Tr. 339-340; Tr. 417-418, Tr. 443-444, 437-439; Tr. 555; RX I at 61. The record

further shows that the PBIF program likely encouraged a substantial number of dislocated workers who otherwise would not have returned to school, to seek re-training, and thereby increased enrollment and other activities related to them. Tr. 437, 448; Tr. 478.

42. While the entrance requirements at schools for JTPA and non-JTPA students were the same, the PBIF program imposed additional requirements on the enrollment of eligible participants for the schools to be eligible for the receipt of reimbursements for the participants' training costs. Tr. 407; Tr. 546. No reimbursement was paid for eligible students who merely registered in all courses. (Id). The program steered eligible participants to alternative careers in areas where they were most likely to secure jobs at higher wages. Id, Job Training Reform Amendments of 1992, P.L. 102-367, pgs. 915-916). The schools had to enroll eligible students in training courses that would lead to occupations in high skills high wage jobs, as identified by the Occupational Forecasting Conference. CX 22, at 12; CX-20-A at 9; Tr., 364; Tr. 405, 407; Tr. 493-494. Occupations were selected based on high growth, full-time employment and high wage levels. There was a wage requirement of \$7.50 an hour and an annual openings requirement of 10 jobs for small regions and 25 jobs for large regions.

43. The record shows that there was lag in time between the events that generated PBIF payments and the actual disbursal of funds. Thus, a student may have graduated or otherwise left a school before the school received payment for the service provided to the eligible student. Tr. 93, 201-202, 269-70. In addition, once a school received payment it could spend the PBIF payout on needed services or equipment, such as, for example, mannequins, cars, or ammunition which were not necessarily used by the JTPA participants who generated the payment. Tr. 90-91; Tr. 167; Tr. 580.

44. FDLES reported that from the inception of the program in 1994 to 1998, enrollments of eligible participants increased over 50% from the base year of 1992. Tr. 575; RX 1 at 56. DOL auditors, however, "counted the individuals they made payments for" and reported that enrollments of "new JTPA Students" totaled 5,507 in 1994, 2,888 in 1995, and 5,330 in 1996. AF at 38; Tr. 182, 197, 221. FDLES counted multiple performances by the students such as dual enrollments or placements. Tr. 254-58.

45. JEP made payments to participating schools that attained certain results with target populations. Steve Campora testified that a school could, for example, generate a payment for enrolling a targeted individual; for having a targeted

individual complete a course of study; for having a covered graduate placed in a job; and for having a dropout complete 36.5 hours of instruction and find a job that paid at least \$7.50 per hour. Tr. 405-07; AF at B-40. *See also*, DOL Exhibit 2 at 151 and Tr. 460-461.

46. The State confirmed Title III eligibility of the participants who were enrolled in PBIF job training programs prior to reimbursing costs by matching the names of the enrollees against the data base maintained by the Department of Labor and Employment Security. (*See*, Finding 40, *supra*). To determine PBIF payments in addition to tuitions, JEP determined the amount of the payments each school received by matching data submitted by each school with the state JTPA management information system (MIS). Cx-22, at 21-23; Tr. 422, 429, 430. JEP verified the JTPA eligibility of individuals named by the schools and identified eligible individuals not reported by the schools. AF at B-40 through 41. One-third of the students for whom incentives were paid were identified through the MIS match, not by the schools. AF at B-32. (*See*, Finding 40, *supra*).

47. The PBIF program provided that educational institutions enroll eligible students in courses that would likely provide skills that would make them competitive for higher wage jobs as identified by the Occupational Forecasting Conference. Tr. 405, 407; CX. 20-A at 9, CX-22, at 12. It further provided that an educational entity could not earn funds for educating the eligible population until it documented that the level of educational performance achieved by the entity the year before the PBIF program began had been attained during PBIF and that its performance level was above and beyond the base year. Tr. 406-07; Tr. 413. For purposes of the PBIF, an eligible student could not be counted for enrollment purposes more than once in a given year. Tr. 410.

48. The schools were reimbursed based on three benchmarks: enrollment, completion, and placement of Title III participants. These criteria were verified prior to reimbursement for training costs. Tr. 411, 415, 422. The State allocated points for different levels of performances by the educational institutions based on historical data. Tr. 463. One or two points were assigned for enrollment, more for completion and the most points were assigned for placement. (*Id*). At the inception of the program, \$69.64 was established as the price per point and each year thereafter the amount decreased, after applying a three percent decrease in productivity and cost of living adjustment. Tr. 464, 467, CX-4, at 9.

49. The record shows that funding under PBIF did not supplant the vocational school or community college revenue levels appropriated by the Florida

Legislature, Tr. 306-307, 324-25; Tr. 546; CX-20-A. at 10, and in no instance did PBIF payments exceed the actual cost of instruction. Tr. 457.

50. The PBIF program was designed to specifically focus on serving eligible participants and in doing so, not to supplant any state responsibility. There were two primary safeguards: (1) federal funds became available for eligible participants only after appropriated general revenue funds had been depleted by the schools; and (2) to be eligible schools had to first provide the same level of service to all populations of students that had been provided the year before the PBIF was implemented, to assure maintenance of effort and to document extra effort by the schools. Tr. 313; Tr. 564-565; CX-20A, at II.

51. Under the program, educational entities were not eligible for any portion of the PBIF funds that had been set aside until they had provided educational services to all students, including general population students and dislocated workers, up to the extent of their annual legislative appropriation. Tr. 309-310, 546, 568, 466-467. During the inception of the program, the criteria for receiving reimbursement for placing an eligible student, included the requirement that the job placement had to be full time with a minimum hourly rate of \$7.50. Tr. 426. In terms of educating and training the targeted population, the PBIF program was relatively successful in its goal to encourage dislocated workers to return to school. Tr. 269; Tr. 497; Tr. 573, 575.

PBIF Did Not Exceed Instructional Costs

52. The OIG calculated that JTPA students were being charged 100% of the average course cost, whereas the general population students were being charged 10% or 75% of those costs depending upon whether they were in a Certificate of degree program. Tr. 133. The record shows that the schools did earn more for training a JTPA-eligible student than a general population student, Tr. 342; 464, 562, but only after they met their base performance criteria. Tr. 354; 338. Prior to that, both general population and PBIF students were funded by general revenues. Tr. 337-338.

53. While the PBIF reimbursement allowed for double the reimbursable amount for eligible participants than for the general population student, the amounts were always less than the actual costs of instruction. Tr. 404, 459, 461, Tr. 332-333; Tr. 343, 368, 464; Tr. 545, 559, 568-570; CX 4 at 49.

54. The total available payment was calculated to approximate, but not exceed, the costs of instruction that were not covered by tuition. AF at B-40. *See also*, DOL Exhibit 2 at 151; Tr. 314; Tr.445, 460-461.

55. State data confirmed that expenditures for the school districts' certificate programs always tended to be lower than the expenditure data for community colleges' degree programs. Thus, Florida adopted the most conservative approach to costs and used school district cost data to generate its cost analysis. Tr. 459. This assured that costs generated for reimbursement under the PBIF program per student were always less than the actual costs of instruction for each student. The OIG confirmed that the State's cost determination did not exceed the cost of training. Tr. 133.

56. Prior to PBIF, JTPA training programs used specialized classes established for JTPA students using federal money to fund the total costs of instruction in those programs. Tr. 333, 495. Recognizing the limitations of placing large groups of dislocated workers in any one particular discipline, the PBIF program infused target population students into established training programs thereby offering greater choice and flexibility to dislocated workers. Tr. 495. During PBIF, the schools were encouraged to offer more courses and sections of classes because of the reimbursement structure of the program, and thus were able to provide added accessibility for the JTPA students. Tr. 493; Tr. 556, 575.

57. While some courses and other services were added to specifically accommodate dislocated workers, *See also* Tr. 305 and 334-335; RX1 at 61-65, many of the courses were offered prior to the implementation of the PBIF program. Tr. 441. *See also* AI at B-38 and DOL Exhibit 2, Volume 2 at 484.

58. In May, June, and October, 1996, ETA conducted field reviews of the program, AF at B-25; DOL Exhibit 2, Volume 3 at 69-83. *See also* Tr. 50-51, 55, 107-108 and 185-186, and subsequently requested that OIG to conduct an audit of the PBIF program. *Id.* *See also*, DOL Exhibit 2, Volume 4 at 101.

59. The OIG audit focused on PBIF disbursements to Florida community colleges and vocational schools between March 1, 1995 and June 9, 1998, and was completed on September 25, 1998. OIG visited 12 community colleges and 6 school districts, interviewed school administrators and 270 students, DOL Exhibit 2, Volumes 11-12, 14, 16-20, 24, 26, 28, 30, 32-33, 35-37, and reviewed reports schools filed with JEP. DOL exhibit 2, Volume 5. at 235-259.

60. OIG concluded that:

PBIF program activities, funded with JTPA monies, violate the Act's provisions. Specifically, JTPA monies may not be used:

- (1) to fund existing activities,
- (2) for unnecessary or unreasonable expenditures. or
- (3) for general obligations of state or local governments.

Public schools received incentive payments for serving JTPA participants, yet did not provide them with instruction or assistance distinguishable from that available to the general student population who attended public schools. The payments are contrary to Section 141(b) of the JTPA (29 U.S.C. §1551(b)) which requires that funds only be used for: "activities which are in addition to those which would otherwise be available in the area in the absence of such funds."

We also question the necessity and reasonableness of payments made from JTPA funds. Incentive payments are determined from calculations of the State's average cost of providing instruction to each student. Florida's statute establishes the portion of instructional costs to be funded from students' tuition payments and the portion to be borne by the State [Florida Statute 239.117, 1995]. As Florida residents, the State's share of JTPA participants' instructional costs were paid by the State, were the costs of other students. The State's obligation to all resident students exists, including PBIF program's participants, regardless of the availability of JTPA funds.

Therefore, additional charges to JTPA, in excess of participants' tuition and fees violate Section 164 of the Act, which requires that to be allowable, costs charged to JTPA programs must: be necessary and reasonable for proper and efficient administration of the program under this Act...

* * *

Similarly, improvements made to programs available to all students who meet enrollment requirements, are general costs of education and should be funded with State monies. While improving the State's adult education programs may be a laudable objective, it is not a proper use of JTPA funds and violates Section 164 (a)(2) of the Act, which prohibits expenditure for:

a. general expense required to carry out the overall responsibilities of State, local, or federally recognized Indian tribal governments... AF at B-28 through B-29.

61. The OIG further determined that the tuition and fees for 92 percent of the JTPA students interviewed were paid by the RWDBs, using JTPA funds, AF at B-30, that any increased enrollment of JTPA individuals at the schools participating in the PBIF program resulted from the RWDBs' efforts, AF at B-3 I, and that JTPA participants and members of the general population had equal access to services at the schools. (AF at B-58, DOL Exhibit 2, Volume 4 at 102).

62. FDLES responded:

PBIF was never intended to fund special services for any subset of its clientele (except accommodations for individuals covered under the Americans with Disabilities Act). Great pains are taken within Florida's educational programs to treat students equally and equitably and not to label and stigmatize students with an association to this program or that program.... If an individual needs special help, for example remediation in reading or math, that student receives those services regardless of the program paying his tuition. AF at B-58.

63. It further observed that the PBIF program was necessary to reverse declining enrollment of disadvantaged students in post-secondary education (AF at B-54) and that, but for the availability of PBIF incentives, the schools had no obligation to increase their capacities or refocus their curricula on high skill/high wage programs. AF at B-58.

64. OIG replied:

We ... question Florida's response that without financial incentives, the schools are not obligated to '...refocus their programs on high skill/high wage programs....' We believe it is an obvious obligation of public educational institutions to revise their curricula, as necessary, to be responsive to their communities' needs and to stay abreast of changing technology. AF at B-37 through B-38

For example, Polk Community College, a PBIF participant, "attested that there were no additional curriculums added to the school program [for Program years 94/95, 95/96, or 96/97] since the school curriculum had already targeted the areas of work demand from the private sector. In the current program year (97/98) they have added two new curriculums." DOL Exhibit 2, Volume 2 at 484.

65. On September 28 1998, OIG issued an Audit Report which recommended that ETA disallow \$11,419,499 in questioned costs for the PBIF program, covering the period between March 1, 1995 and June 9, 1998.

66. The IG noted that it received allegations that JTPA funds were misspent because the schools "were earning a profit for instructing JTPA eligible students." AF at 25. The OIG concluded that the PBIF program was not a bona fide JTPA program, and that "had JTPA funds not been available, additional state or local funds would have been required to meet the needs of the State's residents. AF at 22 and 29. The IG continued: "As Florida residents, JTPA participants are entitled to have a portion of their educational costs borne by the State, as occurred for other students." AF at 23. The auditors interpreted Florida Statute Section 293.117 as obligating the State to pay 75% of the instructional costs for an Associate Degree and 90% of the instructional costs for a Certificate program." AF at 28, fn. 1. "Hence, JTPA students are entitled to have a share of their educational costs borne by the State, as occurred for others in the general student population." AF at 37. In the view of OIG, "JTPA funds have been used to supplant responsibilities of the schools, State, and local governments. " AF at 29.

67. The Grant Officer adopted the recommendations of the audit report and on January 19, 1999, issued an Initial Determination (ID) to FDLES tentatively disallowing the questioned costs. AF at A-14 through 16. On April 29, 1999,

FDLES responded to the ID. AF at A-2. FDLES noted that the Assistant Secretary in 1994 had cited “several cautionary areas,” such as concerns that the PBW program comply with JTPA section 164 (AF at A-9), but it explained that the program had been structured to preclude excessive payments in regard to JTPA participants. AF at A-10. FDLES also urged the Grant Officer to accord proper credit for the schools’ efforts to attract Title III eligible students. AF at A-10.

68. On June 28, 1999, the Grant Officer findings of the ID in a Final Determination (FD). AF at A-8 through 10. The Grant Officer concluded “[t]he State used the funds inconsistent with the JTPA provisions [JTPA sections 14 1(b), 164(a) and 164(a)(2)(C)]; no services or assistance was provided to JTPA participants that justified the use of grant funds to make the incentive payments.” AF at A-8 through 9.

69. For purposes of the disallowances here in issue, the Grant Officer deemed irrelevant (1) eligibility of the participants who received training in the PBIF Program, Tr. 143; 145; 275. *See also*, Transcript June 11, 2001, at Tr. 8; (2) the success of the PBIF program and the number of eligible students who participated in the program, Tr. 220-222; (3) enrollment of the eligible participants, Tr. 233; the costs of training, Tr. 233; (4) the courses provided, Tr. 175; 233; (5) the FTEs calculations; Tr. 233; (6) PBIF program cost and price analysis, Resp. Reply Br. at 9; (7) use of federal funds to replace or supplant state general revenues, Resp. Reply Br. at 9; and (8) whether multiple payments were made for multiple performances by the students, Tr. 274. In addition, the IG investigation uncovered no evidence of misappropriation, waste, or fraud. Tr. 163, 166-67.

Discussion

I.

Between March 1, 1995 and June 9, 1998, the Employment and Training Administration, U.S. Department of Labor, (DOL) granted the State of Florida \$11,419,499 under Title III of the Job Training and Partnership Act (JTPA) to fund a Performance Based Incentive Program (PBIF) established by the Florida legislature and administered by the Florida Department of Labor and Employment Security (FDLES) to provide job re-training opportunities to unemployed workers who, due to economic conditions, were permanently laid-off or terminated. During the period in question, Florida used JTPA money to pay community colleges and school districts that participated in the program.

Following a field audit of the PBIF program by DOL's Inspector General, the Grant Officer disallowed all of Florida's PBIF payments to participating schools, because the funds were allegedly used improperly to pay for activities which were, *inter alia*, available to the general student population not just JTPA participants. According to the Grant Officer, Florida used the funds to improve programs available to all students and pay portions of instructional costs for eligible participants which were otherwise the obligation of the State. JTPA funds were earmarked for certain target group members, but, according to the Grant Officer, other students also derived benefit from PBIF expenditures in violation of the Act. In the Grant Officer's estimation, the State of Florida had an obligation to pay essentially all of the costs above tuition associated with the retraining programs provided by the vocational schools and community colleges that enrolled the JTPA participants. Consequently, the Grant Officer charges that the PBIF was not a bona fide JTPA program, but was used instead as a mechanism to subsidize the State's adult education costs. Florida rebuffs these contentions.

It asserts that PBIF program payments at issue were made only on behalf of JTPA Title III participants¹ whose eligibility was crosschecked with a DOL database and constituted reimbursements for some of the costs associated with the education and training of the participants. It maintains that actual costs of the services provided to the participants, in all cases, exceeded the PBIF reimbursements. Utilizing a detailed cost and price analysis, the State formulated and adopted benchmark payment rates designed to ensure that reimbursements never exceeded the actual costs of training. It argues that its PBIF program, while creating incentives for achieving various goals including enrollment, completion of training, and advancement of participants into high wage jobs, was actually a cost reimbursement program which allowed participating institutions to serve a target population of disadvantaged individuals not otherwise likely to receive training. Florida scoffs at the notion that it used PBIF funds to supplant its obligation to pay for adult education services and emphasizes that vocational education is not an entitlement in the State.

At the outset, it should be noted that the Grant Officer agrees that the eligibility of individuals who received training as participants in the PBIF program is not in issue. Nor is it disputed that eligible participants actually received

¹ ¹ The Grant Officer also questioned \$652,913 in "surplus" Title III funds which were re-routed to Title IIA participants (disadvantaged youth) on the ground that the funds failed to procure services "in addition to" those otherwise available.

competent education and training services in areas specifically authorized by Section 314(d)(1)(A)-(I) of the Act. Although the Grant Officer's rationale, the auditors theories, and often the State's justifications, respectively supporting or opposing the disallowance have all evolved over time posing moving targets which have not been easy to pin down and analyze, it appears that the disallowance is now predicated upon an interpretation of Sections 141(b) and 164 of the JTPA which leads the Grant Officer to conclude that the PBIF program as designed and implemented was, from the very beginning, inherently flawed and violated the Act.

Following an investigation which included interviews with 270 students and officials from 18 colleges and school districts, the Grant Officer concluded that Florida's PBIF program was not designed to assist individual JTPA participants in unique ways. Rather the auditors discovered that JTPA participants enrolled in public school district or community college programs were provided with instruction and assistance which was indistinguishable from the classroom training, job placement, and other services afforded to the general student population. The Grant Officer concluded that, under such circumstances, use of JTPA money to fund payments exceeding tuition was impermissible because the State was already funding those costs of education. Before turning to questions relating to the PBIF program itself, we should consider the statutory framework which guided the drafters of the State's initiative.

II. Statutory Provisions

Section 141(b) of the Act limits the use of JTPA funds to "...activities which are in addition to those which would otherwise be available in the area in the absence of such funds." Section 164 of the Act requires that costs charged to JTPA programs must be necessary and reasonable for proper and efficient administration of the program. Section 164(a)(2)(C) provides that costs must not be a general expense required to carry out the overall responsibilities of State or local governments.

A. Section 141(b)

Since Congress mandated DOL to implement its statutory will under the JTPA, DOL must be accorded deference when it construes the enactment Congress charged it with administering. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 842 (1984); Regions Hosp. V. Shalala, 522 U.S. 448 (1998); Texas Dept. of Labor v.

U.S. DOL, 137 F.3d 329 (5th Cir. 1998) at 332. Yet, the interpretation of a statutory provision by an auditor or a Grant Officer in any particular case may depart from the agency's interpretation, and to the extent that it does, interpretative deference to the litigant's construction may be unwarranted. In this instance, having accorded the Grant Officer's interpretation every consideration, I conclude that the construction of Section 141(b) advanced in this proceeding is a bit too narrow to maximize the potential of dislocated workers whose jobs were moved or outsourced to return to the productive workforce. A key purpose of the JTPA was to explore and fund new programs to train and assist participants in overcoming employment barriers and finding new work. The Grant Officer's interpretation of Section 141(b) in this instance, as demonstrated below, accords insufficient deference to this fundamental statutory mission and seems inconsistent with DOL's own understanding of the statutory provisions at issue here.

At the outset, it should be noted that the parties were invited to comment upon the legislative history of Section 141(b), and neither found any specific guidance which addressed this provision. The Grant Officer and Florida do agree that the Act was never intended to supplant or subsidize the services, facilities, and training activities routinely provided by the State in the absence of JTPA funding. Presumably, in response to the funding abuses Congress detected in the implementation of the CETA program, JTPA's progenitor, Section 141(b) deals with CETA's deficiencies by expressly proscribing the use of JTPA resources on overlapping activities or "duplicate funding." *See also*, Section 107(b). What actually constitutes "duplicate funding" or "activities in addition to those which would otherwise be available," however, is not specifically addressed in the Act. We thus turn for guidance to the regulatory framework DOL promulgated and published to implement the Act.

B. Regulatory Guidance

Recognizing a complex and delicate balance between Federal, State, and local governments, the JTPA and its implementing regulations provide detailed guidelines for the expenditure of JTPA funds by grantees and subgrantees. 29 U.S.C. § 1518; 20 C.F.R. §§ 627.37-629.39; *see generally*, Mississippi Dept of Economic and Community Development v. United States Dept of Labor, 90 F.3d 110 (5th Cir. 1996). Intent upon training disadvantaged and dislocated workers without duplicating the activities otherwise available to JTPA eligible individuals, the statute and the implementing regulations specifically require coordination between the JTPA and other available financial assistance grants and programs.

Thus, Section 627.220(a) of the regulations provides that “SDA’s and Title III SSG’s shall establish coordination procedures and contractual safeguards to ensure that JTPA funds are used in addition to funds otherwise available in the area and are coordinated with these funding sources.” Subsection 627.220(c) further mandates information sharing between the SDA and the educational institution to “prevent duplication of funding and [to streamline] the tracking of the participant’s financial needs.” 20 C.F.R. § 627.220(c). Assessment of the individual’s financial circumstances and the coordination of other available sources of assistance are required; however, DOL construed the resource duplication bar in Section 141(b) as nevertheless permitting JTPA funding under circumstances in which alternative funding, such as student loans, would be “available to” the general population. See, 20 C.F.R. § 627.220((b)(4) *See, Commissioner Employment Security Dept. v. U.S. Dept. of Labor*, 92-JTP-22-7 (1997)(citing, Commissioner of Employment Security of the State of Washington v. U.S. Dept. of Labor, 90-JTP-29, 91-JTP-11, and 92-JTF-34 (Sec’y Sept. 13, 1995)). In this way, the agency has interpreted “availability,” not in any absolute sense, but rather as a practical and flexible test which focuses not only on educational funding sources generally, but on the ways and means to encourage dislocated workers to take advantage of re-training opportunities they had previously overlooked or avoided.

Indeed, in 1994, DOL specifically addressed the inherent ambiguity of the coordination requirements in light of Sections 107(b) and 141(b) of the Act. In its comments to the final rulemaking, DOL stated that “the issue of whether JTPA funds should pay for tuition or supportive services in coordination with other payment programs should be determined according to the availability of each funding source for either training costs or supportive services, with the goal of making the program affordable and enabling the participant to successfully complete it.” Fed. Reg. 59-170, 45815. (Sept. 2, 1994). As the “official comments” to the 1994 Final Rules further explain; “The purpose of coordination requirements is to preclude duplicate or overlapping payments among Federal, State, and local programs to participants and the training institutions and to ensure the best mix of programs and funds is available to the JTPA participant.”

Considered in this context, the term “best mix” suggests that a combination of resources, including JTPA funds, could and should be mobilized to assist the JTPA participant to take part in job training activities which she would not likely pursue without JTPA help. The goal was to somehow lure back the out-of-work seamstress from the apparel industry, for example, who, studies showed, would not likely seek re-training, and encourage her to take the computer technician or other

training program available at a community college and return to the productive workforce.

III. Theories Advanced in Support of the Disallowance

As explored in considerable detail in the Order Denying Summary Decision which previously issued in this matter, the Grant Officer initially explained that DOL endeavored to disallow the expenditure of JTPA funds used to enroll a JTPA eligible participant in any program of adult training offered to a general student population by a public school or community college. Florida community colleges, for example, variously offered a variety of vocational training opportunities designed to satisfy market demands for workers in fields ranging from practical nurses to computer technicians, and eligible JTPA participants were offered the opportunity to matriculate in these programs. Once students enrolled, however, the Grant Officer, for various reasons rejected the notion that any PBIF payments associated with actual training of eligible dislocated workers were appropriate.

A. The Profit Allegation

The auditors, for example, initially noted that DOL received allegations that JTPA funds were misspent because the schools “were earning a profit for instructing JTPA eligible students.” AF at 25. That, of course, would be impermissible because general population students generated no profit; but neither was it true. The record shows that the PBIF reimbursements never exceeded the actual costs of instruction, and there is no evidence that any school earned a profit by educating eligible students.

The Grant Officer further argues, however, that the PBIF payments were “equivalent” to an improper profit for the schools. It is true that the PBIF cost reimbursement system paid the schools more for serving JTPA participants than for serving the general population students, but this is no revelation since the program, as crafted, was intended to create incentives for participation by the schools in re-training the target population. Still, the reimbursement structure paid the schools less than the actual costs of instructing dislocated workers and general population students. Thus, the record confirms that PBIF payments never exceeded the cost of the instruction received by eligible participants. Schools received PBIF payments only after they provided services and documented those services and

only after all of their annual appropriated state revenue funds had been expended on both the general population and the targeted populations.

Under circumstances in which it is alleged that a payment resulted in a school pocketing an unlawful profit, the Grant Officer must, at least, demonstrate, consistent with the burden imposed upon him by the Court in Texas Dept. Of Labor, supra, that a school, in any given year, received revenues, including the JTPA payments, that exceeded the costs it incurred for the training it provided to JTPA participants. In this instance, the Grant Officer has failed to establish that any school earned any profit in any year from its overall operations or for educating any sub-set of its student population, including JTPA eligibles who generated the PBIF payments.

B. Supplantation

The auditors also concluded, and the Grant Officer agreed, that the PBIF program was not a bona fide JTPA program because, in the absence of JTPA funds, additional state or local funds would have been available to meet the needs of the State's residents. AF at 22 and 29. The auditors believed that: "As Florida residents, JTPA participants are *entitled* to have a portion of their educational costs borne by the State, as occurred for other students." (emphasis added). AF at 23. This assertion apparently was predicated upon an interpretation of Florida Statute Section 239.117 which mistakenly led the auditors to conclude that the State was obligated to pay 75% of the instructional costs for an Associate Degree and 90% of the instructional costs for a Certificate program." AF at 28, fn. 1. Thus, the audit report concluded that: "Hence, JTPA students are *entitled* to have a share of their educational costs borne by the State, as occurred for others in the general student population." (emphasis added). AF at 37.² As a consequence, an important principle underpinning the disallowance, at least initially, was the mistaken impression that Section 239.117 "entitled" general population and JTPA students to state funding of costs above tuition, and that "JTPA funds have been used to supplant responsibilities of the schools, State, and local governments." AF at 29. As the record shows, that assumption too was incorrect.

² At the hearing and in post-hearing comments, the Grant Officer seems vaguely to concede that Section 239.177 may not be quite as generous as first assumed, but it matters not, because, according to the Grant Officer, JTPA participant's did not receive "additional" services as otherwise required by Section 141(b). (G.O.. Post-Hearing Comments at p.6).

Section 239.117 created no entitlement to adult education, and the record confirms that the State did not fund educational costs above tuition at the rates it set forth in that provision. Rather, Section 239.117 simply set a cap on tuitions. It did not establish State funding levels for the balance of educational costs above tuition. Nor does it appear that the State funding was supplanted by the availability of JTPA funds.³

The record shows that Florida continued to fund both school districts and community colleges in essentially the same way with essentially the same portion of the State's overall budget before and after the implementation of PBIF; and, as discussed above, schools were paid no PBIF money until they had exhausted their annual state funded appropriations. To be sure, supplantation was an initial concern shared by both the State and DOL in the drafting stages of the PBIF demonstration program; however, it was carefully avoided in the final funding formulations. Contrary to the theory advanced in support of the disallowance, the record fails to demonstrate that PBIF payments supplanted, in violation of Section 164(a)(2)(C), State funding obligations under any provision of Florida law.

C.

Absence of Unique Training

The Grant Officer argued further that training programs "available" to a general student population in classrooms using desks and other physical facilities not designated exclusively for use by JTPA enrollees, must, perforce, be "available" to dislocated workers who go back to school. As a result, the Grant Officer reasoned that all JTPA funds used to re-train dislocated workers at a school with established curriculum tracks for jobs in high demand vocations should be

³ In his post-hearing brief, the Grant Officer contended that Florida's arguments regarding "supplantation" were misplaced. FDLES argued that the State "did not use federal funds to replace general revenue." CPHB at 25. The Grant Officer acknowledged that the auditors raised supplantation as an issue in the audit of the PBIF program (AF at B-29), but the Grant Officer curiously represented that "that finding was not incorporated into the Grant Officer's Final Determination." The record shows, however, that the Grant Officer's Initial Determination adopted the auditor's "position that the uses to which the PBIF program put JTPA funds were unallowable" and "supplantation" was one of the inappropriate uses the auditors alleged. Thereafter, the Grant Officer's Final Determination simply addressed, in a general sense, the disallowances imposed and briefly discussed three issues specifically raised by the state.

Contentions in the post-hearing briefs to contrary notwithstanding, the Grant Officer's Initial and Final Decisions provided no rationale for the disallowances apart from those alleged by the auditors. Nevertheless, the Grant Officer's comments seem to acknowledge that the record, post-hearing, simply fails to support the contention that PBIF payments supplanted State funding of the worker re-training programs. The record shows that the PBIF program assured that federal funds were used in addition to state funding by requiring schools to expend all of their annual appropriated funds on the training of both dislocated workers and general population of students before they became eligible for reimbursements from the PBIF trust fund.

disallowed. Hearing transcript June 11, 2001 at Tr. 25-26, 28, 31-32. Thus, a JTPA participant could not, as the Grant Officer interpreted the Act, receive JTPA funding for training as a computer technician, for example, at any institution which offered a computer technician training program as part of its regular curriculum. Such training at JTPA expense would only be permissible, as the Grant Officer interpreted Section 141(b) of the Act, if the institution created a separate computer technician curriculum and offered it in separate classrooms with desks and chairs specifically earmarked for the JTPA eligible student, and then barred other students from taking the course or using the facilities. Hearing transcript June 11, 2001 at Tr. 25-26, 28, 31-32. Section 141(b), however, demanded no such result.

As the Grant Officer in hindsight suggested, Florida could have employed JTPA funds to design unique curricula and educate and train dislocated workers in isolated groups in separate training facilities with special instructors using desks and chairs singularly assigned to JTPA students, but that is not what this record shows either DOL or the State intended as the template for the re-training of an outsourced or dislocated workforce. To the contrary, the PBIF program, as designed in consultation with DOL and enacted by the State, fully contemplated the use of existing State resources, with updated curricula where needed, in combination with JTPA funding to serve the needs of dislocated workers consistent with the comments to DOL's Final Rule as discussed above. In this way, the inefficiencies associated with creating, managing, and administering a totally separate re-training operation for JTPA participants were avoided while the educational opportunities available to participants were broadened. Florida expended its revenues in support of the general population and target population students enrolled in its adult education programs before PBIF kicked in. While the Grant Officer would argue in seeking Summary Decision and later at the hearing, that the use of JTPA funds to re-train eligible students in a computer course, for example, which was open to the general student population was inappropriate, that is precisely the sort of integrated "best mix" of resources that DOL's regulations contemplated and the PBIF program was designed to foster.

D. New Enrollments

Taking a somewhat different tack, the Grant Officer next contended that "there is no evidence that PBIF generated any new enrollments in Florida's community colleges and vocational schools." He acknowledged, however, that the RWDBs actively and successfully recruited JTPA eligible individuals, including Title III dislocated workers, referred them to programs at community colleges and

vocational schools, and paid their tuition and other costs such as books, transportation, and child care. *See*, Grant Officer's Post Hearing Brief at 4-5; *See also*, Tr. 614; Tr. 563.

While the active and successful recruitment itself provides a basis in circumstantial evidence from which it may reasonably be inferred that the program as a whole generated enrollees who probably would not have otherwise sought re-training, the record shows, even by the count provided by the auditors, that large numbers of dislocated workers were re-trained. Considering the studies showing the failure of prior programs to serve the target population in contrast with the numbers of dislocated workers re-trained in Florida, it would be difficult to conclude that this record is devoid of evidence that PBIF generated new enrollments.

E. Unnecessary Payments

The Grant Officer further emphasizes that he disallowed the expenditure of PBIF because Florida had, in fact, assumed responsibility for the percent of instructional costs not covered by student fees; and, as a consequence, the issue is what the State did, not what Florida Statute Section 239.117 did or did not require. *See*, Post Hearing Brief at 12-13; *See also*, Tr. 126; Tr. 237-38; 268; 276-277; and 607-608. There was, the Grant Officer believes, a reasonable expectation that the Florida legislature would appropriate sufficient funds for a pre-determined number of Florida residents to have their instructional costs above tuition covered by the State and contends that the expectation was, in fact, realized during the period in question. In many instances, JTPA students were "transparent" to the schools meaning that the schools and instructors did not know they were members of the target population until an MIS match was identified, and often the dislocated workers were unaware PBIF payments were being made on their behalf. Thus, the Grant Officer rejects as irrelevant Florida's point that the PBIF payments were reasonable because they did not, cumulatively, exceed the costs of services provided to JTPA students. In summary, the Grant Officer contends that the availability of post-secondary education to JTPA participants did not depend on the availability of JTPA funds because once tuition was covered, the State covered the rest. Consequently, when the auditors concluded that the PBIF program disbursements of JTPA funds were not necessary for JTPA individuals to access school services, the Grant Officer concluded the payments violated JTPA Section 141(b), and were per se unreasonable within the meaning of JTPA Section 164.

The difficulty in applying the interpretation of Sections 141(b) and 164 of the Act urged by the Grant Officer is its underlying static assumption that the education and re-training participants received given the PBIF payments were precisely the same service they would have received absent the PBIF payments. It is true, as the Grant Officer argues, that essentially the same educational services were “available” to dislocated workers before the State legislature adopted the PBIF program, and it is also true that the State provided funding above tuitions prior to PBIF. Compl. Br. at 16. *See also* Tr. 494. The fees paid by or on behalf of students, the State’s FTE appropriations, and school cutbacks, when necessary, covered student instructional costs before and during the PBIF demonstration program.

Yet, the record shows that despite the alleged “availability” of bits and pieces of what was to become the PBIF program, including re-training opportunities and funding above tuitions, the target population, prior to PBIF, remained largely outside the system. In fulfilling its obligation to its general population, which included its dislocated workers, the State apparently lacked the focus on the particular target population Congress singled out for special attention in the JTPA. Thus, the level of “availability” as measured by the participation of dislocated workers in the pre-PBIF State system, including funding above tuitions, was not meaningful for the class of outsourced and dislocated workers Congress intended to benefit. Witnesses in this proceeding cited studies indicating the dislocated workers simply were not being re-trained and re-employed in significant numbers. The PBIF program, to a large extent, changed that. Considered in context, the “activity” in addition to those that were otherwise “available” in the area within the meaning of Sections 141(b) and 164 was the PBIF program itself.

F.

PBIF Yielded Value

The Grant Officer contended, however, that the PBIF disbursements to the schools produced no “value” for the JTPA program, and that FDLES improperly discriminated against JTPA students by providing them with the same services and access to services as the general student population while charging JTPA students a premium price; in effect, discriminating against JTPA. In this manner, FDLES, the Grant Officer argues, diverted \$11,419,499 in JTPA funds to Florida community colleges and vocational schools without producing any benefit for JTPA. The Grant Officer argues that the issue is not whether state and federal government can operate programs, either on their own or in collaboration, to assist dislocated workers. The issue is whether the PBIF was a bona fide JTPA program,

and, according to the Grant Officer, the PBIF program was not a bona fide JTPA program, because, in part:

...nothing transpired, no service was provided to JTPA students that gave them any kind of advantage over general population students. They received during that term at the schools, exactly the same services as all the general population students. So they should not pay any more than you would expect a general population student to pay. Tr. 178. *See also*, Cx A1 at B-22.

The record shows that dislocated workers in Florida prior to the implementation of PBIF were an underserved population that rarely sought re-training on their own, had few available job opportunities, and had a high likelihood of ending up on welfare. While the parties dispute the precise numbers, the record shows that the PBIF program did put thousands of these individuals back on track to re-enter the job market. While other elements of the general student population seemed self-motivated to pursue various types of job training opportunities; for reasons touched upon, but not fully explored on this record, dislocated workers were less inclined to return to school. Thus, to the extent that the PBIF program identified dislocated workers and helped them in significant numbers to overcome whatever inertia was tending to keep them from returning to school, the program did accomplish bona fide JTPA objectives.

The result was the recruitment and re-training of thousands of outsourced or dislocated workers who were channeled through the vocational school and community college systems just as Congress intended. As the Grant Officer now peers back upon the PBIF demonstration project, however, he deems it of “no value” to the JTPA, and denies that any evidence was adduced that the vigorous recruitment of a non-traditional student population that previously had tended not to enter the re-training market imposed any added costs on the system even when it resulted in unfunded FTE’s.

While successful recruitment here produced a substantial influx of a previously underserved population; even if it is assumed that marginal costs of educating the recruits were zero, as the Grant Officer suggests, it still would not justify the conclusion that PBIF produced “no value” for JTPA. When marginal costs are zero as is often the case with the use, for example, of intellectual property such as a patent, “social value” still may be considerable. Furthermore, although the Grant Officer has not demonstrated that marginal costs were zero at any school;

in this instance, eligible individuals who, prior to PBIF most likely would not have returned to school, received competent education and training which directly impacted in a positive manner their ability to earn a living. Congress set that as a goal of the JTPA, and achieving it has “value.”

G.

Likelihood of Additional State Funding

The Grant Officer argues further that it is altogether “plausible” that, absent the PBIF program, the State would have funded costs above tuition no matter how many recruited in-state students the federal program sent its way, and he reasons that the PBIF payments were, therefore, unnecessary. Yet, the record fails to establish that a program involving recruitment and tuition assistance alone would have achieved the desired results. Clearly, Florida’s old system of subsidizing costs above tuition had not effectively reached the dislocated workforce; but, then again, the State had no demonstrable independent obligation to provide special treatment for a small portion of its general population. Re-training dislocated workers was a federal mission priority as manifested by the JTPA. Consistent with the State’s interest, if not its obligation, the State agreed to participate in the mission, but the Grant Officer has failed to demonstrate that the State had any independent obligation or inclination to single out any portion of its population for special treatment apart from the PBIF program.

It is in this context that the PBIF program was crafted and proposed as a whole to the Florida legislature, and there is no evidence that the State would have engaged in a vigorous recruitment effort targeting a relatively small segment of its population if payments covering tuition were the only federal input. The Grant Officer may believe that there are no marginal costs associated with educating the target population, but State officials who testified in this proceeding seemed rather dubious, and it is likely that the State legislature was as well. Under such circumstances, both the State and DOL took great care to avoid the supplantation and profit problems which had notoriously plagued CETA program implementation, but PBIF payments below cost for specific levels of student re-training achievement seemed fairly safe, especially under circumstances in which State educational funding levels were not supplanted.

Beyond that, there is no evidence in this record to support an assumption that the State, prior to the PBIF program, had either an obligation or inclination to fund a program to seek out students whose tuitions were paid by the federal government leaving the State with an open-ended commitment to fund the bulk of

the remaining costs for a recruited population of essentially undefined dimensions. The Grant Officer acknowledges that, prior to the PBIF program, and absent any recruitment efforts directed at the dislocated workforce, Florida's vocational schools and community colleges successfully filled their seats with other students. Under these circumstances, it would seem reasonable to anticipate the State's concern that aggressive recruiting of a targeted population which had tended not to generate costs in the past could lay upon the State's fisc a claim of indeterminate but sizable magnitude.

Nor is it likely that the schools and colleges would have participated in a re-training effort that expected them to shoulder the burdens if the recruiting efforts pushed their populations over authorized funding levels. The Grant Officer, peering back in perfect hindsight suggests otherwise, but it is unlikely that rational educational institutions, at the time, would have joined the venture if, by design, it placed virtually unlimited demands on their scarce resources by potentially creating an upsurge in the number of unfunded FTE's they could expect to absorb. It required no great prescience on the part of school administrators to foresee that the JTPA goal of recruiting a previously underserved portion of the population into a system which was already filling all its seats raised legitimate funding questions. As crafted, however, the PBIF program, in part, addressed those concerns by providing incentives to the both the State and the individual institutions to participate in the JTPA mission in a manner which seems entirely consistent with the requirements of the JTPA.

IV. Section 141(b) "Availability"

What this record demonstrates is that the general "availability" of an "activity," such as a training course, on the supply side as offered by a school and partially funded by the State is not the only factor which must be considered under Section 141(b). Consistent with purposes of the Act and the agency's comments, it also seems appropriate to consider demand side factors like a laid-off worker's realistic likelihood of pursuing the activity absent the challenged program. Indeed, the JTPA targets dislocated workers precisely because experience showed that, for a variety of reasons, many were reluctant or unwilling to pursue the educational opportunities theoretically available to them and tended not to seek re-training. Starting over is not easy for a displaced worker who, at mid-career, finds his or her job exported or outsourced.

Consequently, both the supply and demand side must be evaluated in a dynamic sense over time in assessing, under Section 141(b), the “availability” of an activity to the JTPA participant. In this instance, the dislocated worker population which traditionally was not served by the existing State funded adult education programs received a considerable boost by the PBIF program. Considering the term “availability” as used in Section 141(b) of the Act, it would be difficult to avoid concluding in a broader more meaningful sense that the PBIF program as a whole was an activity “in addition to” those which had had little success in serving the target population.

V. Documentation

Finally, the Grant Officer argues that he invited FDLES to “provide actual documentation of the costs incurred as well as the basis for allocating a portion of those costs to JTPA Title III,” and that the State never availed itself of that invitation, and never quantified, for example, the cost of the “coordinator” ostensibly hired by Jacksonville Community College to serve the JTPA student population. Yet, the State did not bear the initial burden of justifying its expenditures, and there “is no support in the statute or the regulations that each expenditure must be traced to a specific identifiable individual.” Texas Dept of Commerce v. DOL, 137 F.3d 329 at 332 (5th Cir. 1998). Further, the Grant Officer challenged the PBIF program as a whole on the ground that it violated Sections 141(b) and 164 of the Act. Documentation of individual costs as they related to individual levels of student achievement in moving through the process of re-training and finding a job or dropping out was not a focus of this proceeding.

VI. Conclusion

In the end, the fact that general population students may have enjoyed the same levels of achievement as the target group without the benefit of PBIF payments simply recognizes that the PBIF demonstration project was implemented through the use of the State’s existing vocational school and community college structures. Indeed, the record shows that general population students always took advantage of the training programs offered by the State while dislocated workers traditionally did not. Reaching the formerly employed was precisely the problem the PBIF program was designed to address. DOL, moreover, in furtherance of its implementation of a Congressionally mandated JTPA mission, captured the efficiencies that State educational resources contributed to the program while

avoiding the administrative, instructional, and facilities duplication inefficiencies that a separate JTPA training system would have imposed.

Considering the record viewed as a whole, the disallowance here in issue can not be sustained based upon questions relating to (1) eligibility of the participants who received training in the PBIF Program, Tr. 143; 145; 275. *See also*, Transcript June 11, 2001, at Tr. 8; (2) the success of the PBIF program and the number of eligible students who participated in the program, Tr. 220-222; (3) enrollment of the eligible participants, Tr. 233; the costs of training, Tr. 233; (4) the courses provided, Tr. 175; 233; (5) the FTEs calculations; Tr. 233; (6) PBIF program cost and price analysis, Resp. Reply Br. at 9; (7) use of federal funds to replace or supplant state general revenues, Resp. Reply Br. at 9; or (8) whether multiple payments were made for multiple performances by the students, Tr. 274. Nor did the OIG investigation uncover evidence of misappropriation, waste, or fraud. Tr. 163, 166-67. Distilled to its essence, the Grant Officer's case hinged on an interpretation of Sections 141 (b) and 164 of the Act that essentially rendered the State's PBIF demonstration program unlawful, *ab initio*. Having carefully reviewed the record evidence, however, I conclude, for all of the foregoing reasons, that Sections 141(b) and 164, broadly construed consistent with the purposes of the Act and the implementing regulations, do not preclude the PBIF expenditures at issue here. Accordingly;

ORDER

IT IS ORDERED that the appeal filed by the State of Florida, FDLES, be and it hereby is, granted, and that costs disallowed by the Grant Officer be, and hereby are, allowed.

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Stuart A. Levin
Administrative Law Judge